Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-2032

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN DE TOMASO,

Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INC.

Respondent.

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

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ARGUMENT

I. THE CALIFORNIA SUPREME COURT DID NOT, AND, IN THE ABSENCE OF COMPLIANCE WITH CALIFORNIA LAW, COULD NOT TAKE JUDICIAL NOTICE OF THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT.

In his Petition for Writ of Certiorari, Pages 27-31, DeTomaso raised the issue that when the California Supreme Court went outside the evidence, albeit by error, to arrive at the basis for its opinion that the tort claims were preempted by the RLA, it deprived DeTomaso of property and his right to due process of law guaranteed him under the Constitutions of both California and the United States.

In its Opposition to DeTomaso's Petition, section "B. THE EVIDENCE QUESTION PRESENTED", Pages 5-7, and section II of "ARGUMENT", Pages 24-25, Pan Am contends that the California Supreme Court could take judicial notice of a document contained in the Clerk's Transcript even though admitting that it was not introduced into

evidence nor marked for identification. More specifically, Pan Am states that DeTomaso did not disclose in his Petition that prior to the commencement of trial, the trial judge treated Pan Am's "Trial Brief" as a "Motion for Summary Judgment", that appended thereto were 12 pages of an unidentified document which Pan Am describes as copies of Articles 34-38 of a COLLECTIVE BARGAINING AGREEMENT, and that the trial judge denied the motion. Pan Am concludes that because pages from what it describes as the Collective Bargaining Agreement between DeTomaso and Pan Am were part of its Trial Brief which, in turn, was treated as a Motion for Summary Judgment, the California Supreme Court can take "Judicial Notice" of same. In support of its conclusion, Pan Am cites California Evidence Code §452(h). Section 452(h) provides:

"§452 Matters which may be judicially noticed....

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputed accuracy."

For the following reasons, Pan Am's contention is not correct:

A. The California Supreme Court did not take judicial notice of the document represented by Pan Am to be part of the Collective Bargaining Agreement. An examination of the Opinion (Petition, Appendix A-1 to A-40) does not refer to judicial notice having been accorded the document.

B. The California Supreme Court could not, without complying with California law, take judicial notice of the document. California Evidence Code §450 states:

"Judicial notice may not be taken of any matter unless authorized or required by law."

Section 459 provides:

"§459. Judicial notice by reviewing court. (c) When taking judicial notice under this section of a matter specified in Section 452....that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action." (Emphasis added).

Section 455(a) requires that:

"(a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed." (Emphasis added).

None of the requirements of the California Evidence Code were complied with by the California Supreme Court, hence the Court was without power to judicially notice the document. If it in fact took judicial notice of the document, such conduct deprived DeTomaso of due process of law and of his property rights under the

U. S. and California Constitutions as specified in his Petition, Pages 27-31.

C. It is reasonable to believe that the California Supreme Court honestly believed the document referred to by Pan Am in its Opening Brief on Appeal before that Court, was an exhibit in evidence. Even such an honest error does not save the opinion of the Court from the Constitutional arguments presented by DeTomaso. The opinion is based solely on the belief by the Court that the investigation was "mandated" by the "Collective Bargaining Agreement", and concluded that misconduct during the investigation (in fact, it did not take place during the investigation) would be preempted under the RLA.

D. It has already been pointed out that the conduct of Pan Am in citing the Court to a document known by it not to be in evidence in the record, is regarded by

the California Supreme Court as "reprehensible practice on the part of counsel", and the Court should have "disregarded" the reference contained in the brief. (Petition, p. 28).

The document in question does not identify the parties thereto, appears to be part of a larger document, contains no dates of execution (if executed) or of effectiveness, and has never, on the record or off, been the subject of discussion between counsel or with the courts at any level. De Tomaso never acknowledged its validity or its existence. Pan Am did not meet its burden of proof as to the terms and requirements of the agreement and what it mandated, if anything. The court cannot fill this void by speculation.

E. When the trial court denied Pan Am's Motion for Summary Judgment, that became a final order and was appealable. Pan Am

did not appeal same and did thus waive its right to do so. The Motion for Summary Judgment could not have been granted in any event because California Code of Civil Procedure §437c requires that the motion be supported by affidavits, declarations under penalty of perjury, answers to interrogatories, depositions, and matters on which judicial notice shall or may be taken. None of these requirements were complied with.

II. THE TORTS PERPETRATED BY PAN AM ON DE TOMASO WERE NOT FOUNDED UPON AN INCIDENT OF THE EMPLOYMENT RELATIONSHIP AND DID NOT INVOLVE EITHER THE MEANING OR APPLICATION OF A PROVISION OF A COLLECTIVE BARGAINING AGREEMENT.

The genesis of the relationship between Pan Am and DeTomaso was that of vendor/vendee. DeTomaso bought goods from Pan Am. When the question arose as to whether the goods were stolen by DeTomaso from Pan Am, Pan Am had the right to determine whether De Tomaso, who was also an employee of Pan Am,

had stolen the goods. That question involved the employer/employee relationship. Having determined by its investigation that the goods had not been stolen by De Tomaso, but had been purchased by him from Pan Am, the question of theft, involving the employer/employee relationship, ended. Next, Pan Am, through illegal means, (self-help, conversion, unlawful use of color of authority, threat of arrest, and accusations of theft), sought to, and did, regain possession of part of the goods it had sold to DeTomaso. This phase involved the recovery of goods sold to DeTomaso by Pan Am and stemmed from the vendor/vendee relationship. The conduct of Pan Am, as to its conduct during the "recovery operation", had nothing to do with the interpretation, meaning or application of a collective bargaining agreement, nor was its conduct founded upon the employment relationship.

In Pan Am's Opposing Brief, "ARGUMENT", Section I, Pan Am urges that the rule set forth by the United States Supreme Court in Elgin, Joliet and Eastern Railway Company v. Burley (1944) 325 U.S. 711, 716, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886, 1915 should apply to preempt DeTomaso's tort claims in that said claims, Pan Am contends, arose out of a "minor dispute" or constitute facts involving an "omitted case". (Opposing Brief, Pages 20-24). In Elgin, the U. S. Supreme Court defined "minor dispute" and "omitted case" as follows:

(722).."The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event, the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective bargaining agreement, e.g., claims on account of personal injuries..."

In the instant case, there is no collective bargaining agreement before the Court. The Court is, therefore, deprived of the document which would have to be examined to

determine its meaning or application.

The matter is not an "omitted case" in that the conduct complained of by DeTomaso did not arise from the employment relationship but, rather, during the vendor's (Pan Am) effort to regain possession of goods it sold to DeTomaso (vendee).

Had DeTomaso not bought the goods from Pan Am, but had he taken them (by mistake or by theft) from the Pan Am warehouse, then the conduct of Pan Am in trying to regain possession of the goods from DeTomaso would have involved the effort by an employer to regain possession of goods wrongfully taken from it by an employee (employer/employee relationship) and, thus, the situation would be different.

Under the same section of ARGUMENT, at Page 23, as well as in Section "A. THE FACT QUESTION PRESENTED" (P. 4), Pan Am, in an effort to bring DeTomaso's tort claims within the purview of the RLA, sets forth allega-

tions which it says appeared in "DeTomaso's FIRST and/or SECOND AMENDED COMPLAINTS:" to wit:

"1. ...defendants so negligently conducted an investigation...as to breach its obligation to conduct a proper investigation, and did on January 11, 1979, discharge plaintiff... as the direct and proximate result of a negligently conducted investigation."

This case went to trial on the Second Amended Complaint. Nowhere in that Complaint can that language, or anything similar to it, be found (CT68-76). It was contained in the First Amended Complaint, but was deleted when that complaint was amended. This is but another example of Pan Am trying to mislead the Court by intentional false references. Paragraphs numbered 2, 3 and 4 on Page 23 were in the Second Amended Complaint but DO NOT RELATE BACK TO PARAGRAPH 1 WHICH WAS NOT IN SAID COMPLAINT. Paragraphs 2, 3 and 4 are not fully quoted by Pan Am, and by putting them after paragraph 1, make it look like they refer back to it.

Another example of false representation by Pan Am is also found on Page 23 of its Opposing Brief where it alleges:

"If, as DeTomaso now contends in this Court 'his damages flowed from torts that occurred months before his discharge' [Pet. P.24 ...." (Emphasis added).

Pan Am is trying to make this Court believe that DeTomaso is only now, in his Petition for Writ of Certiorari, for the first time, contending he suffered damages from Pan Am's conduct occurring months before his discharge. It is simply not true. An examination of De Tomas's Second Amended Complaint clearly alleges that on October 17, 1978, Pan Am defamed DeTomaso at his home by accusing him of dishonesty. DeTomaso was fired in January, 1979, months later (CT 68-76 at 74).

III. DE TOMASO, AS AN AIRLINE EMPLOYEE, HAD THE RIGHT TO GRIEVE HIS DISCHARGE, AND AS A VENDEE, HAD THE RIGHT TO SUE FOR TORTS ARISING FROM THE VENDOR/VENDEE RELATIONSHIP.

In Pan Am's Opposing Brief, section II of "ARGUMENT" (Pages 24-25), Pan Am contends

that without regard to whether the collective bargaining agreement was in evidence, the State Court action would be barred by the RLA itself because DeTomaso submitted his grievance to the Adjustment Board and obtained relief in that proceeding. Pan Am cites Andrews v. Louisville & Nashville Railroad Company (1972) 406 U.S.302, 92 S.Ct. 1562, 32 L.Ed. 95, as authority. Pan Am quotes from Page 323 Andrews as follows:

"the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking, but from the Act itself..."

Pan Am also quotes from Page 325:

"a party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding."

DeTomaso had two separate and distinct relationships with Pan Am. He was a buyer of goods, and he was an employee. As a buyer of goods, the seller (Pan Am) defamed him by accusing him of stealing the goods bought

by him from Pan Am. DeTomaso filed a civil action for defamation and intentional infliction of emotional distress arising out of the sales transaction, and a jury found that Pan Am had, in fact, defamed DeTomaso, that he suffered damages, and fixed the amount along with damages it found as a result of a breach of warranty of title arising also from the sale. Pan Am did not appeal on the ground that the facts do not support the verdict, but on the ground of preemption under the RLA.

By coincidence only, DeTomaso was an employee of Pan An. After he filed his civil action against Pan Am on December 22, 1978, Pan Am fired him on January 11, 1979, on the ground of dishonesty, alleging he stole the goods he had bought months earlier, the sale of which Pan Am had long since verified.

Under the RLA, DeTomaso could only seek reinstatement of his job and benefits. The RLA does not provide for an award of damages arising from negligent or intentional torts.

The rights available in a court are not available under the RLA at all.

DeTomaso, as an airline employee, grieved his discharge. He contended that the ground for his discharge, "theft", was not true. He did not litigate the issue on the merits (to a conclusion) before the Adjustment Board, because during the hearing, and after DeTomaso's attorney finished cross-examination of Pan Am's witnesses, Pan Am offered to reinstate DeTomaso together with lost wages. DeTomaso accepted and was reinstated.

DeTomaso, as a buyer of goods, was also defamatorily accused of theft. He filed his civil action and won it.

The question is: Does the RLA preempt a tort claim arising not from the employment relationship, but from the conduct of the airline as a seller of goods during its effort to regain possession of said goods, simply because the buyer is, coincidentally,

an employee of the airline? Can DeTomaso have his RLA remedy of reinstatement as an airline employee wrongly fired for an alleged theft, and also have a civil remedy as a buyer of goods defamed during a recovery operation by the seller who also happens to be the employer of the buyer?

DeTomaso contends that he could not seek reinstatement of his job in a court action because he would then be seeking relief exclusively available under the RLA. But, he contends that he, in his vendee relationship with Pan Am, has the right to State Court relief for torts committed against him by the airline that did not stem from rights created under the RLA or a collective bargaining agreement. Thus, the rule of Andrews would not be violated.

IV. ERRONEOUS STATEMENTS OF FACT AND EVIDENCE BY PAN AM IN ITS OPPOSING BRIEF (Hereinafter "OB)

A. Allegation: Cargo desgined for out-of-state consignees cannot be abandoned cargo

and cargo only becomes abandoned at its destination (OB9, section A).

Fact: Pan Am's Clipper Cargo Manual defines abandoned cargo as "undelivered" cargo - undelivered because of loss, theft, not accepted, bad address, refusal to pay, etc. The manual does not include either of the allegations set forth above. Cargo can be lost, by example, anywhere along the pipeline of delivery and thereby be undelivered at the destination, hence to fall within the definition.

B. Allegation: DeTomaso bought goods from a salvage bin and then added goods to those he bought, from the Lasso inventoried transfer bin (OB 9-10, section B).

Fact: There were no items purchased by DeTomaso on Sept. 19, 1978 that were not on the Lasso inventory. DeTomaso bought all of the items in the bin that Lasso inventoried. DeTomaso "added" nothing to the bin he bought. The jury found DeTomaso had

stolen nothing. The same bin had been offered to another employee before being sold to DeTomaso.

C. Allegation: DeTomaso had the duty to trace the consignees of goods he bought from Pan Am since there were visible airway bill numbers on some of them (OB10-11, section C)

Fact: The Pan Am Clipper Cargo Manual places the burden on Pan Am to determine the status of cargo before it sells it as salvage, and to comply with the manual and the law prior to sale. The burden is not placed on a buyer, herein of DeTomaso.

D. Allegation: DeTomaso was a thief under California Penal Code §485 because he found lost property, had the ability to locate the owner, and did not do so (OB 13-14, section F).

Fact: The jury rejected the "truth" defense. Further, DeTomaso did not "find" lost property. He was "sold" property. Both California Appellate Courts have rejected

this contention.

E. Allegation: Allegations of theft by Pan Am to union representatives was privileged. (OB 14-15, section G).

Fact: Startzell denied calling De Tomaso a thief on October 17, 1978. the subsequent allegations of theft in December, 1978 and January, 1979 were corroborative of DeTomaso's testimony and that of his son, Sean. As such, it would have been error to exclude it.

F. Allegation: California Commercial Code §2312(2) provides a defense for breach of warranty of title (OB 15-16, section H).

Fact: The jury was instructed on §2312(2) and rejected the defense.

CONCLUSION

The California Supreme Court's "preemption" conclusion was based solely on its belief that the terms of the collective bargaining agreement mandated the investigation. In so concluding, the Court's resort to a document not in

evidence was reversable error, and its decision must be reversed.

For a second reason, the decision should be reversed. DeTomaso's State Court tort remedies are not preempted when they stem not from the employment relationship but from wrongful conduct occurring when Pan Am, as a vendor of goods, unlawfully recovered part of the goods stolen by it from the vendee. Prior to embarking on the recovery operation, Pan Am had determined that DeTomaso had bought the goods and had not stolen them. That determination terminated Pan Am's interest in its employee, since the only thing it had a legitimate interest in knowing was whether as an employee, DeTomaso had stolen the property.

For the reasons specified herein, and in the Petition, DeTomaso prays that a Writ of Certiorari be granted.

Respectfully submitted,

Robert N. Cleaves
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of twenty-one years and not a party to the within action; my business address is: 1224 Roberto Lane, Los Angeles, California 90077.

On July 29, 1987, I served three copies of the within PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the above case numbered 86-2032, on each of the parties set forth below, enclosed in a sealed envelope, postage prepaid, depositing same in the United States Post Office at Los Angeles, California, addressed as follows:

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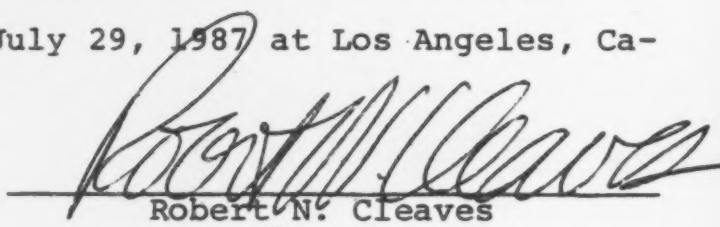
All parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct.

Executed: July 29, 1987 at Los Angeles, California.



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